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## THE INTERNATIONAL LAW COMMISSION AND THE DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW

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### ABSTRACT

International investment law has assumed an increasing prominence largely due to the proliferation of investment treaties and the number of arbitral awards made thereunder. Yet, there are many core questions that remain to be authoritatively answered. This Article considers the nature of the divergences in investment treaty jurisprudence and the role that the International Law Commission (ILC) could potentially play in contributing to the coherent development of international investment law. The Article argues that some areas of international investment law are more appropriate for attention by the ILC than others. It draws a distinction between those aspects of international investment that only have a basis in treaty law and those aspects of international investment law that are underpinned by common standards stemming from customary international law or general principles of law.

The Article argues that international investment scholars cannot necessarily expect the convergence of jurisprudence in the context of treaty provisions that have been specifically negotiated by the parties, as these provisions must be interpreted on a case-by-case basis. This means that topics like the most-favored-nation (MFN) clause are less suitable for codification, as the meaning of these provisions will often depend on the particular context of the treaty and the precise intentions of the parties. In contrast, there is a stronger case for the codification of international investment law where common standards exist. The Article therefore considers the formation and development of customary international law in relation to investment protection. It argues that

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while investment treaty tribunals have struggled with the identification of customary international law in this area, the ILC could play a central role in clarifying the state of the relevant rules and principles, in furtherance of its core mandate of promoting the progressive development and codification of international law.

## I. INTRODUCTION

International investment law is a fast-moving and dynamic area of law. The subject has assumed an increasing prominence over the past twenty years, largely due to the proliferation of investment treaties and the number of arbitral awards decided on the basis of these instruments. At the end of 2011, 450 known cases had been brought under bilateral investment treaties or similar agreements.<sup>1</sup> At the same time, there are a number of fundamental questions that remain to be answered. Although the majority of investment treaties follow a very similar logic and structure,<sup>2</sup> arbitral tribunals have often adopted diverging interpretations of treaty provisions.<sup>3</sup> In turn, this has led to doctrinal confusion and questions about the coherence of international investment law.<sup>4</sup> Some authors have even talked about a “legitimacy crisis” in international investment law.<sup>5</sup>

Recently, the International Law Commission (ILC) has joined the debate concerning how to address this challenge.<sup>6</sup> The central argument of this Article is that the ILC can make a valuable contribution to the development and consolidation of international investment law. At the same time, it suggests that the ILC should choose its focus of study carefully. It also suggests that the current focus of the ILC on the most-favored-nation (MFN) treatment<sup>7</sup> is not likely to lead to satisfactory

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1. *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE NO. 1 (United Nations Conference on Trade and Development (UNCTAD)), Apr. 2012, at 5, available at [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf).

2. See STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 65 (Cambridge Univ. Press 2009); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 431 (2010).

3. See *infra* Part III.

4. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

5. See *id.*; Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51, 52 (2004). But see Devashish Krishan, *Thinking About BITs and BIT Arbitration: The Legitimacy Crisis that Never Was*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄELDE 107, 110 (T. Weiler & F. Baetens eds., 2011).

6. See *infra* Part IV.

7. Most-favored-nation (MFN) treatment refers to the guarantee that a foreign investor from one country will not be treated less favorably than foreign investors from other countries.

results as the interpretation of these clauses largely depends upon the particular wording of individual treaties. In such cases, there is little reason to expect a coherent jurisprudence given the autonomous nature of the treaty standards, and therefore these issues should be left to tribunals to develop based upon existing rules of treaty interpretation. Rather, this Article argues that the ILC should concentrate on its core mandate of codifying customary international law.<sup>8</sup> The Article argues that customary international law relating to the protection of investors is ripe for codification. Moreover, the ILC is an ideal institution to undertake this task, due to its composition and its position at the heart of the United Nations (UN) system.

## II. THE FUNCTION OF THE INTERNATIONAL LAW COMMISSION

The ILC was established in 1947<sup>9</sup> to assist the UN General Assembly in its task of “encouraging the progressive development of international law and its codification.”<sup>10</sup> The Commission is a body of thirty-four independent experts<sup>11</sup> elected by the UN General Assembly.<sup>12</sup> Candidates must have a “recognized competence in international law.”<sup>13</sup> Moreover, the composition of the Commission as a whole should reflect “the main forms of civilization and the principal legal systems of the world.”<sup>14</sup> These characteristics of the Commission cannot be overemphasized as they add significantly to the legitimacy of its work in producing authoritative and influential texts on the existing state of international law.<sup>15</sup>

It must also be stressed that the ILC does not work alone in the codification process. The ILC Statute explicitly requires consultation between the Commission and individual governments on the one

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*Towards a New Generation of Investment Policies*, WORLD INVESTMENT REPORT (United Nations Conference on Trade and Development, Geneva, Switz.), 2012 at 137.

8. Statute of the International Law Commission (ILC), G.A. Res. 174 (II), U.N. Doc. A/RES/36/39 (Nov. 18, 1981), at art. 1, para. 1 [hereinafter ILC Statute].

9. The ILC Statute was adopted in November 1947, the first elections for the Commission took place in November 1948 and the Commission met for the first time in 1949. *See Introduction*, INTERNATIONAL LAW COMMISSION, <http://untreaty.un.org/ilc/ilcintro.htm> (last visited June 1, 2013).

10. U.N. Charter art. 13, para. 1.

11. IAN SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* 14 (Grotius Publ'ns 1987).

12. ILC Statute, *supra* note 8, art. 3.

13. *Id.* art. 2.

14. *Id.* art. 8. In fact, the composition is subject to a “gentleman’s agreement” that the seats will be divided amongst the five geographical regions of the UN and each permanent member of the Security Council will have their own representative. *See SINCLAIR, supra* note 11, at 15–16.

15. For example, Sinclair suggests that “the Commission, if it is to produce drafts likely to be generally acceptable to States, should be so composed as to reflect the varying tendencies and attitudes of geographical groupings within the United Nations system.” *Id.* at 17.

hand,<sup>16</sup> and with the UN General Assembly on the other hand.<sup>17</sup> In practice, the ILC maintains a regular dialogue with the Sixth Committee of the UN General Assembly,<sup>18</sup> as well as with other intergovernmental bodies with an interest in codification of international law.<sup>19</sup> These are important provisions, as the imprimatur of governments is often key to successful codification.<sup>20</sup>

According to its Statute, “the [ILC] shall have for its object the promotion of the progressive development of international law and its codification.”<sup>21</sup> Thus, the Commission has two related but arguably distinct tasks. Codification is understood as “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”<sup>22</sup> Progressive development, on the other hand, refers to “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.”<sup>23</sup> In practice, the ILC has struggled to clearly distinguish between these two activities.<sup>24</sup> Moreover, even the earliest attempts of international codification by the League of Nations recognized that the process of codification “should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to the contemporary conditions of international life.”<sup>25</sup>

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16. ILC Statute article 19, paragraph 2 provides, “The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.” *See also* ILC Statute, *supra* note 8, art. 21, para. 2 (requiring the Commission to submit a final draft of any proposed codification to governments for comment before formally submitting them with recommendations to the General Assembly).

17. ILC Statute, *supra* note 8, art. 20.

18. The Sixth Committee of the UN General Assembly is responsible for Legal Affairs, and it is this body that receives the annual reports of the ILC. *See* R. P. U.N. G.A. 98(f).

19. *Introduction*, *supra* note 9.

20. *See* ALAN E. BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 178 (2007) (“Of greatest importance, however, is the Commission’s relationship with the General Assembly, because its work can only be successful if it is politically acceptable to member states.”); *see also* SINCLAIR, *supra* note 11, at 125 (“A codification convention that does *not* enjoy the support or approval of a significant group of States whose assent is necessary to the effective implementation of the convention is hardly likely to be regarded as being expressive of existing international law or as generating new law.”).

21. ILC Statute, *supra* note 8, art. 1, para. 1.

22. *Id.* art. 15.

23. *Id.*

24. SINCLAIR, *supra* note 11, at 46.

25. *Resolutions and Recommendations Adopted by the Assembly During Its Eighth Ordinary Session*, League of Nations, § III(I) (Sept. 27, 1927).

Despite these procedural ambiguities, the ILC has to date played an important role in developing various aspects of international law. The ILC is perhaps best known for its preparation of draft articles on the law of treaties<sup>26</sup> and the law of state responsibility.<sup>27</sup> However, the ILC has also contributed to the development of several substantive areas of international law, such as the international law of the sea, international environmental law, and international criminal law.<sup>28</sup> Indeed, the work of the Commission has been highly influential in the development of international law.

Sometimes, the recommendations of the ILC lead to the negotiation and conclusion of a treaty, as in the case of the law of treaties.<sup>29</sup> In these cases, the results are binding upon those states that choose to consent to be bound by the instrument. Yet, often, the work of the ILC can also have a declaratory effect on international law, even if a state does not formally accept it. Thus, many provisions of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) are considered to be declaratory of customary international law and therefore binding on all states, whether or not they have become a party to the treaty.<sup>30</sup> Moreover, even when they are not adopted in treaty form, texts prepared by the Commission have been taken into account by courts and tribunals as a definitive statement of customary international law.<sup>31</sup>

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26. The Commission produced a set of draft articles on the law of treaties in 1966. *See generally Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/183/Add.1-4.

27. The Commission adopted a set of draft articles on the law of state responsibility in 2001. *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). The UN General Assembly took note of the draft articles and commended them to the attention of governments in 2001. *See Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Dec. 12, 2001); *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 59/35, ¶ 1, U.N. Doc. A/RES/59/35 (Dec. 2, 2004).

28. For a general overview of the work of the ILC, see THE WORK OF THE INT'L L. COMM'N, U.N. Doc. ST/LEG/ILC/8, U.N. Sales No. E.12.V.2 (8th ed. 2012). *See also* BOYLE & CHINKIN, *supra* note 20, at 183–200.

29. *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int'l L. Comm'n, 177, 177–87, U.N. Doc. A/CN.4/183/Add.1-4. These draft articles formed the basis of the Vienna Convention on the Law of Treaties adopted in 1969. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

30. *See, e.g., Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 38, ¶ 46 (Sept. 25) (“The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.”).

31. For example, in *CMS Gas v. Argentine Republic*, the arbitral tribunal accepted that Article 25 of the ILC Articles on State Responsibility “adequately reflects the state of customary international law on the question of necessity.” *CMS Gas Transmission Co. (U.S.) v. Argentine*

Nor is it only through formal codification that the work of the ILC can be influential. In practice, the Commission has also contributed to the so-called crystallization of customary international law. In the *North Sea Continental Shelf Cases*, the court explained the crystallization of international law relating to the continental shelf as “the process of the definition and consolidation of the emerging customary law [that] took place through the work of the [ILC], the reaction of governments to that work and the proceedings of the Geneva Conference . . . .”<sup>32</sup> This potential for interaction offers enormous opportunities for the development of customary international law through the work of the ILC. At the same time, it has been observed that the Commission remains a rather conservative body, dealing with fairly traditional questions of international law and leaving the response to new and complex regulatory challenges to other international institutions.<sup>33</sup>

This background sets the stage for some important questions about the role of the ILC in promoting the progressive development and codification of international investment law. Is this an area of international law that is ripe for codification and/or progressive development? Can all aspects of international investment law be subject to the same processes of codification and progressive development?

### III. HISTORICAL PERSPECTIVES ON THE CODIFICATION OF INTERNATIONAL INVESTMENT LAW

International law has addressed the protection of foreign investors for over a century. There are many examples of international arbitral awards in the early twentieth century that were concerned with the protection of foreigners from the arbitrary treatment of host governments.<sup>34</sup> Indeed, in 1924, a Committee of Experts constituted by the League of Nations to investigate which topics or fields of law were “sufficiently ripe” for codification included the law relating to the protection of aliens in their recommendations.<sup>35</sup> Yet, the Hague

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Republic, ICSID Case No. ARB/01/8, Award, ¶ 315 (May 12, 2005).

32. *North Sea Continental Shelf Cases* (Ger./Den./Neth.), Judgment, 1969 I.C.J. 3, ¶ 61 (Feb. 20). See also Counter-Memorial of the Netherlands, *North Sea Continental Shelf* (Ger./Neth.), 1968 I.C.J. Pleadings 307, ¶ 66 (Feb. 20).

33. See, e.g., Alan E. Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* 61, 62 (A. E. Boyle & D. Freestone eds., 1999).

34. One of the most commonly cited cases from this period is the so-called Neer claim. *Neer Case* (U.S. v. Mex.), 4 R.I.A.A. 60, 60–66 (Gen. Cl. Comm’n 1926).

35. The Resolution was adopted by the Assembly of the League of Nations on September

Codification Conference of 1930 was unable to agree on rules reflecting the current state of international law in this area<sup>36</sup> and there were no clear outcomes of this initiative.

Almost two decades later, when the ILC was established, the question of which topics of international law were ripe for codification was once again on the table. Charged with preparing a report on the codification of international law, Hersch Lauterpacht concluded that the treatment of aliens was a topic that deserved the attention of the newly created UN body.<sup>37</sup> Lauterpacht argued the following:

The reasons which have been adduced in the previous section as militating in favour of a renewed effort at codifying the law of nationality and of conflicts of nationality—the growing movement across frontiers in an age in which barriers of distances have dwindled and the enhanced status of the individual as the subject of fundamental rights and freedoms—apply even more cogently to the question of the treatment and the legal position of aliens.<sup>38</sup>

He also noted the “substantial body of State practice which, however, is only imperfectly related to principle.”<sup>39</sup> Thus, Lauterpacht saw an opportunity to clarify the rules and principles that applied to the protection of aliens, including foreign investors.

Following this recommendation, the ILC gave early priority to the law of state responsibility, including responsibility for the mistreatment of aliens.<sup>40</sup> Yet, the ILC ran into similar problems that had emerged during the previous attempt at codification by the League of Nations. Some members of the Commission greeted the draft articles prepared by Francisco V. García-Amador, as Special Rapporteur on the law of state responsibility, with deep skepticism. As noted by James Crawford and Thomas Grant, “the decade of decolonization could hardly have been a worse time to attempt a statement of what many governments (Latin

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27, 1927, where it decided to refer inter alia the topic of “Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners” to an international conference on codification. See 1 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (1930), ix (Shabtai Rosenne ed., 1975).

36. The Final Act of the Conference simply reflected that “[t]he Responsibility Committee was unable to complete its study of the question of the responsibility of States for damage caused on their territory to the person or property of foreigners, and accordingly was unable to make any report to the Conference.” 3 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (1930), 871 (Shabtai Rosenne ed., 1975).

37. Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum by the Secretary-General, ¶¶ 79–84, Int’l Law Comm’n, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949).

38. *Id.* ¶ 79.

39. *Id.*

40. See, e.g., G.A. Res. 799 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630, at 52 (Dec. 7, 1953).



American but increasingly Asian and African governments also) perceived as the law of economic development by capital-exporting countries.”<sup>41</sup> In particular, one contributor to the ILC debates referred to “a distinct cleavage between the views held on the subject of the law of claims in the United States of America, on the one hand, and in the Latin American republics on the other.”<sup>42</sup> It was clear that this was an area where deep political and ideological splits would prevent the codification of international law, despite the existence of a number of cases where arbitral tribunals and courts had applied standards of customary international law. The ILC therefore dropped the plan to codify substantive rules of state conduct with regard to aliens, and instead turned its attention to identifying the secondary rules of state responsibility.<sup>43</sup>

It is the same hostility towards the codification of rules on the protection of aliens that led many capital-exporting states to conclude investment treaties as a means of protecting their nationals investing abroad. The Federal Republic of Germany started this trend in 1959 when it concluded its first Bilateral Investment Treaty (BIT) with Pakistan, and many other states soon followed.<sup>44</sup> Today there are over 2,500 BITs, as well as a growing number of regional economic instruments containing a chapter dedicated to the protection of investors and investments.<sup>45</sup> Most of these instruments contain similar standards of investment protection, as well as procedures for investor-state dispute settlement that allow individuals or companies negatively affected by the actions of a state to bring a claim directly to an arbitral tribunal.<sup>46</sup>

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41. James Crawford & Tom Grant, *Responsibility of States for Injuries to Foreigners*, in HARVARD RESEARCH IN LAW CONTEMPORARY ANALYSIS AND APPRAISAL 77, 89 (John P. Grant & J. Craig Barker eds., 2007).

42. *Comments of Gomez Robledo of the 566th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n 265, ¶ 11, U.N. Doc. A/CN.4/SER.A/1960 (noting three particular areas of disagreement: the position of aliens, the waiver of diplomatic protection (Calvo Clause), and the denial of justice).

43. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 1–2 (2002).

44. The Belgium/Luxembourg Economic Union concluded its first Bilateral Investment Treaty (BIT) with Tunisia in 1964. See F.A. Mann, *British Treaties for the Protection and Promotion of Investments*, 52 BRIT. Y.B. INT'L L. 241, 241 (1981). France concluded its first BIT in the early 1970s, whereas the United Kingdom started its BIT program in 1975. See *id.* With its first BIT concluded with Egypt in 1982, the United States was relatively late in concluding investment treaties compared to European nations, although it already had a longstanding network of friendship, commerce, and navigation treaties which played a similar role. See Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203 (1988).

45. WORLD INVESTMENT REPORT, *supra* note 7, at 84.

46. Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 215 (2008).

The rapidly growing body of arbitral decisions is leading to what some call a global investment regime.<sup>47</sup> Yet, there are differences of opinion concerning the extent to which BITs converge around common standards. There is a trend for arbitrators to cite other decisions, even decisions made under other distinct treaties, on the rationale that “it is a fundamental principle of the rule of law that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones.”<sup>48</sup> At the same time, clear divergences have emerged in the case law about whether common standards exist, and if they do, on the content of such standards.<sup>49</sup> Indeed, the central question that underpins many of the contemporary investment cases is arguably the extent to which we can claim the existence of general principles that support the multitude of BITs, rather than standards based upon the particular intentions of the parties to a treaty.<sup>50</sup> This is the context in which the ILC has entered the debate about the interpretation and application of investment protection standards in BITs.

#### IV. THE INTERNATIONAL LAW COMMISSION AND MOST-FAVORED-NATION TREATMENT

It was in response to the doctrinal confusion at the heart of international investment law that the ILC took up the topic of MFN treatment in 2009.<sup>51</sup> The ILC had already dealt with MFN clauses in the 1970s, culminating in the adoption of draft articles on the topic in 1978.<sup>52</sup> Yet, the draft articles had been met with some caution by states,

47. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. J. INT’L L. 427, 431 (2010).

48. Daimler Fin. Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶ 52 (Aug. 22, 2012); *see also* Suez v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 189 (July 30, 2010).

49. An example would be the conflicting decisions on the scope of the full protection and security standard in the U.K.-Argentina BIT. *Compare* Suez, *supra* note 48, ¶ 175, with Nat’l Grid P.L.C. v. Argentine Republic, Award, ¶ 189 (UNCITRAL Arb. Nov. 3, 2008). *See also* Stanimir A. Alexandrov, *On the Perceived Inconsistency in Investor-State Jurisprudence*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES AND OPTIONS 60, 60–61 (José E. Alvarez & Karl P. Sauvant eds., 2011) (reflecting that some of the perceived conflicts can be explained by different facts and different treaty provisions).

50. *See, e.g.*, Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT’L & COMP. L.Q. 361, 383 (2008).

51. The ILC had first discussed the possibility of adding this topic to the work program in 2006. Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, ¶ 259, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter 2006 Report]. The ILC decided to include “the Most-Favoured Nation Clause” on its program of work at the sixtieth session and to establish a Study Group at the sixty-first session. Rep. of the Int’l Law Comm’n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, ¶ 354, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10 (2008) [hereinafter 2008 Report].

52. *Draft Articles on Most-Favoured Nation Clauses with Commentaries*, [1978] 2 Y.B.

and the UN General Assembly did not follow the recommendation of the Commission to conclude a treaty on the topic.<sup>53</sup> Rather, it ultimately decided to simply bring the draft articles to the attention of states and relevant intergovernmental organizations for their consideration in such cases “as they consider appropriate.”<sup>54</sup>

The impetus to revisit the topic came from the increasing relevance of MFN to many legal issues, particularly in the field of international economic law. Thus, the ILC noted in its 2008 report that “MFN has been given a new lease of life with the inclusion of regional trade agreements and the explosion in the conclusion of bilateral investment agreements, all usually including some form of MFN requirement.”<sup>55</sup> As a result, “there is now a substantial new body of practice to be taken into account in assessing how MFN clauses are being used and how they operate in practice.”<sup>56</sup>

It seems that the aim of the current work the ILC has undertaken is not to revise the draft articles previously adopted in 1978.<sup>57</sup> Indeed, the Study Group appears to confirm the core principles at the heart of the 1978 articles in its discussions.<sup>58</sup> Rather, “the overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment particularly in relation to MFN provisions.”<sup>59</sup>

Although the mandate of the Study Group includes MFN in trade law and other areas of international law,<sup>60</sup> the Study Group has largely focused on MFN in the investment context in its work to date.<sup>61</sup> The

Int'l L. Comm'n 16, ¶¶ 73–74, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2) [hereinafter 1978 ILC Yearbook].

53. The UN General Assembly adopted five resolutions from 1978 to 1988 calling for comments from states on the draft articles. G.A. Res. 33/139, U.N. Doc. A/RES/33/139 (Dec. 19, 1978); G.A. Res. 35/161, U.N. Doc. A/RES/35/161 (Dec. 15, 1980); G.A. Res. 36/111, U.N. Doc. A/RES/36/111 (Dec. 10, 1981); G.A. Res. 38/127, U.N. Doc. A/RES/38/127 (Dec. 19, 1978); G.A. Res. 40/65, U.N. Doc. A/RES/GAOR, 40th Sess. (Dec. 11, 1985).

54. *Consideration of the Draft Articles on Most-Favoured Nation Clauses*, G.A. Dec. 46/416, U.N. GAOR, 33d Sess., ¶ 8, U.N. Doc. A/46/655 (Dec. 9, 1991).

55. 2008 Report, *supra* note 51, ¶ 10, Annex B. *See also id.* ¶¶ 16–21.

56. *Id.* ¶ 17, Annex B.

57. Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, ¶ 362, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter 2011 Report].

58. *See id.* ¶ 355.

59. Rep. of the Int'l Law Comm'n, 64th Sess., May 7–June 1, July 2–Aug. 3, 2012, ¶ 246, U.N. Doc. A/67/10; GAOR, 67th Sess., Supp. No. 10 (2012) [hereinafter 2012 Report].

60. *See id.* (noting MFN in relation to trade in services under the General Agreement on Trade in Services as well as the relationship between MFN, fair and equitable treatment, and national treatment standards “will be kept in view as the Study Group progresses in its work.”).

61. Although the Study Group started its discussions with a broad discussion of MFN

principal concern underpinning the work of the Study Group is the fact that different factors appear to have influenced tribunals in their decision-making processes. In other words, it is the so-called “*Maffezini* problem”<sup>62</sup> that has been driving the work of the Study Group.

*Maffezini* was a case brought by an Argentinean investor against the Kingdom of Spain under the Spain-Argentina BIT.<sup>63</sup> Spain opposed the jurisdiction of the tribunal because the claimant had not complied with Article X of the BIT, providing that claimants must submit disputes to domestic courts for a period of eighteen months before the claimant could launch an international claim.<sup>64</sup> In turn, the claimant relied upon the MFN clause in the Spain-Argentina BIT to argue that it could claim the more favorable treatment granted to Chilean investors who did not have to submit their cases to national courts before they started arbitral proceedings under the Spain-Chile BIT.<sup>65</sup> The tribunal noted that it was necessary to interpret the MFN clause in the Spain-Argentina BIT subject to the *ejusdem generis* rule,<sup>66</sup> holding as follows:

[N]otwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favoured nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.<sup>67</sup>

*Maffezini* was the opening shot in a barrage of lawsuits that sought to circumvent or expand the procedural provisions of BITs based upon the MFN clause. Yet the tribunals charged with deciding these disputes came to divergent conclusions on whether MFN clauses could be used in this way. Generally, the cases are divided into those that follow the general logic and philosophy of *Maffezini* that dispute settlement

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clauses in modern treaty practice, the focus of their deliberations has since narrowed to concentrate on the investment context. At the 2011 session, the Study Group considered a working paper prepared by Donald McRae, co-chair of the Study Group, on the “Interpretation and Application of MFN Clauses in Investment Agreements.” See 2011 Report, *supra* note 57, ¶ 351. The following year, the Study Group considered a working paper by Mathias Forteau on the “Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions” and an updated working paper by Donald McRae on the “Interpretation of MFN Clauses by Investment Tribunals.” See 2012 Report, *supra* note 59, ¶¶ 250, 264.

62. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶¶ 38–40 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002).

63. See *id.* ¶ 1.

64. *Id.* ¶¶ 19–20.

65. *Id.* ¶¶ 39–40.

66. *Id.* ¶ 46.

67. *Id.* ¶ 54.

provisions do fall within the scope of MFN treatment<sup>68</sup> and those cases, led by *Plama v. Bulgaria*,<sup>69</sup> that make the opposite assumption. In reality, the picture is much more complex than this simple bifurcation of the case law suggests, and tribunals have adopted multiple approaches to resolving ambiguities in MFN clauses. Indeed, the case law on this issue has become a veritable quagmire. Not only have the number of cases on this topic continued to grow, but there have also been an increasing trend of dissenting opinions being appended to arbitral awards, demonstrating the strong differences of opinion on the correct interpretation to be given to BITs.<sup>70</sup> There is even an example of an arbitrator changing his mind about the correct interpretation to be given to a particular treaty.<sup>71</sup>

Undoubtedly, these cases in part demonstrate different “underlying philosoph[ies] of investment arbitration.”<sup>72</sup> This is particularly true when different tribunals have interpreted the same treaty in diametrically opposed ways.<sup>73</sup> Differing philosophies, however, is not the only explanation for the diversity of results in the MFN cases. Many of the differences can also be explained by the fact that the MFN clauses in BITs often follow very different formulations. In this regard, the 1978 Draft Articles explicitly recognized that “although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning

68. *E.g.*, *RosInvest v. Russ. Federation*, Case No. V/079/2005, Award on Jurisdiction, ¶¶ 124–39 (SCC Arb. 2007).

69. *Plama Consortium v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 183–227 (Feb. 8, 2005).

70. *See, e.g.*, *Austrian Airlines v. Slovk. Republic*, Final Award, ¶ 1 (UNCITRAL Arb. Oct. 9, 2009) (Arbitrator Brower, dissenting); *Impregillo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 1–3 (June 21, 2011) (Arbitrator Stern, concurring and dissenting, Arbitrator Brower, concurring and dissenting); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 1–2 (Oct. 24, 2011) (Arbitrator Thomas, dissenting); *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 1 (Aug. 22, 2012) (Arbitrator Brower, dissenting).

71. *See* *Daimler*, *supra* note 70, ¶ 39, where Arbitrator Janeiro expressed an opinion contrary to the opinion he voted for in *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, at 1 (Aug. 3, 2004). For an explanation of his change of heart, see the Separate Opinion of Arbitrator Janeiro where he explains that he “participated in the latter decision, including of course the Decision on Jurisdiction, and endorsed the opinion of the other members of the tribunal specifically in order to ensure the smooth internal functioning of the tribunal.” *Id.*

72. Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in *INVESTMENT TREATY LAW CURRENT ISSUES* III 239, 250 (Andrea F. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., 2009).

73. *Compare* *Siemens*, *supra* note 71, ¶ 184, and *Hochtief*, *supra* note 70, ¶ 81 with *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 197 (Dec. 8, 2008) and *Daimler*, *supra* note 70, ¶ 200.

and effect of such clauses must be made, and accepted, with caution.”<sup>74</sup> Rather, as noted by the Commission of Arbitration in the *Ambatielos Case*, “the question [of the interpretation of an MFN clause] can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.”<sup>75</sup> Given that this is an area where there is a significant diversity of language in BITs,<sup>76</sup> it follows that there is a limit to the degree of harmonization and uniformity that one can expect concerning the interpretation of the MFN clause. In other words, this is an area where assumptions about common standards should not be made with too much haste.

Many investment treaty tribunals have expressly recognized the role that treaty language plays in this area. For example, in *Renta 4 v. Russian Federation*, the tribunal noted the futility of trying to identify the dominant view concerning any presumption that must apply to the interpretation of a MFN clause.<sup>77</sup> The tribunal stressed that “it is a matter of the wording of the relevant instruments.”<sup>78</sup>

Nevertheless, it is not only treaty language that can make a difference in these cases. In *The MOX Plant Case*, the International Tribunal for the Law of the Sea stressed that “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.”<sup>79</sup> The application of this logic in the investment context was confirmed by the tribunal in *AES Corp v. Argentine Republic*, when it held that “each BIT

74. 1978 ILC Yearbook, *supra* note 52, at 20.

75. *Ambatielos Claim (Greece/Gr. Brit./N. Ir.)*, 12 R.I.A.A. 83, 107 (1956).

76. U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), MOST-FAVOURLED-NATION TREATMENT, at 96, U.N. Doc. UNCTAD/DIAE/IA/2010/1, U.N. Sales No. 10.ILD.19 (2010) (referring to variations in the approaches to MFN treatment and sometimes considerable differences in the wording of the substantive protection or ISDS clauses). Indeed, as noted by Vandeveld, “the MFN treatment provision became common in BITs only in the 1970s [and] the structure of the provision was the subject of significant variation in the early history of the provision, with some developed countries that were among the first to launch BIT programs continuing to modify their provisions significantly even into the 1990s.” KENNETH J. VANDELDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION* 357 (2010).

77. *Renta 4 S.V.S.A. v. Russ. Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration V (024/2007), Award on Preliminary Objections, ¶ 94 (Mar. 20, 2009).

78. *Id.* ¶ 90. The tribunal continued, “this is one of the reasons awards under BITs are of variable relevance and value in subsequent cases.” *Id.* The tribunal in *Maffezini* itself noted that the MFN clause that it was faced with interpreting, which applied to “all matters subject to this Agreement,” was broader than the usual formulation found in many other investment treaties concluded by Spain. *Maffezini*, *supra* note 62, ¶ 60.

79. *MOX Plant Case (Ir. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, 10 ITLOS Rep. 95, ¶ 51.

has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties.”<sup>80</sup> The tribunal continued that, “striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of ‘investments’ or for the precise definition of rights and obligations for each party.”<sup>81</sup> Indeed, the recent decision in *Austrian Airlines v. Slovak Republic* emphasized the importance of context in interpreting MFN clauses.<sup>82</sup>

This observation on the bilateral nature of MFN clauses has important implications for the nature of any work undertaken by the ILC on this topic. The ILC Study Group has recognized the diversity of language and the need to take into account the particular intentions of the parties to a treaty. The 2012 Report of the ILC stated that “whether or not an MFN provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on each particular treaty, which had its own specificities to be taken into account.”<sup>83</sup> Yet, if the meaning of each treaty potentially differs, what general guidance can the ILC usefully proffer?

One possible approach that could be taken by the ILC is to focus on the methods of interpretation adopted by arbitral tribunals when analyzing MFN clauses. This has been the focus of several working papers discussed by the Study Group to date.<sup>84</sup> On this basis, the ILC may be able to assist in preparing interpretative guidance on the underlying principles that may inform the interpretation of MFN clauses.<sup>85</sup> It must be wondered, however, whether the ILC can do anything more than recommend that tribunals follow more carefully the general rules on treaty interpretation found in Articles 31–33 of the Vienna Convention.

An alternative output suggested by the Study Group is the development of “model MFN clauses or categories of clauses with

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80. *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 24 (Apr. 26, 2005).

81. *Id.* ¶ 25.

82. *Austrian Airlines*, *supra* note 70, ¶ 138. Note, however, the strong dissenting opinion of Arbitrator Brower on this point, where he says that “it is not appropriate to consider provisions as ‘context’ for interpreting an MFN clause that are less favourable than provisions in third-State treaties to which Claimant claims access.” *Id.* ¶ 7 (Brower, Arb., dissenting).

83. 2012 Report, *supra* note 59, ¶ 262.

84. See, e.g., 2012 Report, *supra* note 59, ¶¶ 258–59.

85. *Id.* ¶ 260.

commentaries on their interpretation.”<sup>86</sup> Such clauses would be directed as “guidance to States in their negotiation of agreements with MFN clauses.”<sup>87</sup> This approach certainly avoids the need to address the differences in existing treaty language by focusing on possible advice for negotiators of future instruments. Yet, the merits of this approach are also questionable. Even if model clauses are accepted as helpful in avoiding the problems posed in the case law, it must be wondered whether the ILC is the best body to conduct this type of work.

Other parties have undertaken similar exercises in the past. The UN Conference on Trade and Development (UNCTAD) has already explicitly provided policy advice to negotiators and policy-makers.<sup>88</sup> Particularly notable in this context is the UNCTAD report on MFN Treatment, updated in 2010, which precisely aims to provide policy advice and guidance to states seeking to negotiate investment treaties.<sup>89</sup> The report generally advises states to “be aware that, as for any other provision of the investment treaty, wording matters and the formulation resulting from the negotiation should make the intention of the parties clear and unambiguous,”<sup>90</sup> as well as setting forth model language that can be used by negotiators to achieve this end. Any effort by the ILC to develop model clauses would therefore appear to be duplicating activity that is taking place in other forums.

Indeed, there is evidence that states are already beginning to address these issues, even without the advice of international institutions. Looking at recently concluded investment treaties, it would appear that states have recognized that they may have to give a more precise indication of their intentions. Thus, for example, the 2009 U.K.-Ethiopia BIT expressly provides in its MFN clause that “except provided otherwise in this Agreement and for the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 10 of this Agreement,” thus making clear that it covers investor-state dispute settlement.<sup>91</sup> In contrast, Article 88(2) of the Japan-Switzerland Economic Partnership Agreement provides that “[i]t is understood that

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86. 2008 Report, *supra* note 51, ¶ 38, Annex B.

87. *Id.*

88. MOST-FAVoured-NATION TREATMENT, *supra* note 76, 102–16.

89. Thus, the report provides, “it is . . . important to take stock of the way treaty practice has evolved and to what extent States have reacted to the debate on MFN treatment [in order to] allow States [to make] better-informed decisions for drafting and negotiating purposes . . .” *Id.* at 4.

90. *Id.* at 87.

91. Agreement for the Promotion and Protection of Investments, U.K.-Eth., art. 3(3), Nov. 19, 2009, available at [http://arbitration.org/sites/default/files/bit/ethiopia\\_united\\_kingdom\\_english.pdf](http://arbitration.org/sites/default/files/bit/ethiopia_united_kingdom_english.pdf).



the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes between a Party and the non-Party that are provided for in other international agreements.”<sup>92</sup> In addition to these examples of language found in the treaties themselves, some states have resorted to authoritative interpretations to clarify their intentions.<sup>93</sup> For example, it is reported that “the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”<sup>94</sup> Ironically, such moves have the effect of creating further diversity and fragmentation by focusing on the specific intention of the parties, rather than general principles.

The conclusion that can be gleaned from this analysis is that the ILC can only make a limited contribution to the MFN question, given the fundamentally bilateral nature of the issue. Indeed, this is a point that has been made in relation to other topics on the agenda of the Commission. For example, when it was proposed to consider the topic of oil and gas law under the rubric of shared natural resources, the ILC decided that the fact that “transboundary oil and gas issues were essentially bilateral in nature” raised doubts about “the need for the Commission to proceed with any codification exercise on the issue, including the development of universal rules.”<sup>95</sup> Rather, “it was considered that the option of collecting and analysing information about State practice concerning transboundary oil and gas . . . would not lead to a fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas.”<sup>96</sup> While this is a crude analogy, it can also be said that the interpretation of MFN clauses varies on a case-by-case basis depending on the intentions of the parties to a

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92. For a broader range of examples in United Nations Conference on Trade and Development, see MOST-FAVORED-NATION TREATMENT, *supra* note 76, 84–87.

93. It is generally accepted under the law of treaties that parties are capable of adopting interpretative agreements which must be taken into account in the interpretative process. See Vienna Convention on the Law of Treaties, *supra* note 26, art. 31(3)(a). See also Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 179 (2010).

94. Nat’l Grid P.L.C. v. Argentine Republic, Decision on Jurisdiction, ¶ 85 (UNCITRAL Arb. June 20, 2006).

95. Rep. of the Int’l Law Comm’n, 62d Sess., May 3–June 4, July 5–Aug. 6, 2010, ¶ 382, U.N. Doc. A/65/10; GAOR, 65th Sess., Supp. No. 10 (2010). Other reasons were also advanced for not considering the topic, including the fact that the subject may touch upon continental shelf delimitation, which was a politically delicate subject. *Id.*

96. *Id.* ¶ 383.

particular treaty. In other words, the specificities of the issue suggest that further study of MFN treatment may not be a fruitful exercise for the ILC and will yield limited results.

At the same time, it does not follow that the ILC has no role to play in the development of international investment law. The following Part argues that the ILC could play a potentially significant role in identifying universal rules that underpin and unite the plethora of BITs in the international investment law universe.

#### V. THE SEARCH FOR UNIVERSAL INVESTMENT RULES

The previous Part argued that it cannot be assumed that similarly worded treaties should be interpreted in the same way. There are often strong legal and practical reasons why tribunals should acknowledge and apply differences in wording. At the same time, many authors also agree that there may be circumstances in which tribunals should interpret different treaties according to a single, common rule. Thus, S.W. Schill argues that “[n]otwithstanding . . . differences, investment treaties conform to archetypes and converge considerably with regard to the principles of investment protection that they establish.”<sup>97</sup> He continues, “[t]hese principles are more or less identical across the myriad of BITs [and] divergences in the treaty texts are arguably limited enough so as to allow the conclusion that one can observe the existence of relatively uniform treaty texts that form the basis of any international investment treaty.”<sup>98</sup> Similarly, K.J. Vandevelde asserts the following:

Given that the language of the provision often is somewhat vague and general in any event, little reason exists to believe in most cases that minor changes in languages were meant to alter significantly the meaning of the provision. Such changes often reflected little more than stylistic preferences or perhaps attempts to state more clearly that which was presumed to be the meaning of the provision.<sup>99</sup>

Such arguments must be treated with caution, as they make assumptions about universality that may not be justified. Moreover, they overlook the autonomy of states when concluding investment treaties. This is why arguments about coherence in relation to the interpretation of MFN clauses appear misplaced.

Nevertheless, the argument for universal rules can be justified if it draws upon other sources of international law apart from the treaty itself. In his more recent work on multilateralism in investment law, Schill acknowledged that “the move . . . to create a multilateral order for

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97. SCHILL, *supra* note 2, at 65.

98. *Id.* at 69.

99. VANDEVELDE, *supra* note 76, at 13.

international investment relations will only be legitimate and accepted by States if it remains linked to one of the traditional sources of multilateral order under international law.”<sup>100</sup> This is an important clarification because it recognizes that there must be a doctrinal foundation for drawing links between what are otherwise distinct instruments. It follows that there is a need to identify whether there is a basis for a common standard in another source of international law before one can talk about a universal rule or principle that applies to all states. This basic consideration must inform the debates about the emergence of a *jurisprudence constante* in international investment law. It can also help assess the potential role that the ILC can play in the development of international investment law.

Although both customary international law and general principles could provide a source for a unifying force in international investment law,<sup>101</sup> the focus of this Article is on the former for two principal reasons. The first reason for prioritizing the search for rules of customary international law is that general principles are generally considered to play a secondary role in international law, in the sense that they should only be applied where there is a lack of treaty law or customary law.<sup>102</sup> Thus, the first inquiry is whether there is a customary rule; only if there is no evidence of such a rule would there be a second inquiry into whether there is a general principle that can be deduced from national legal systems. The second reason is that tribunals most commonly make reference to customary international law as the source providing a relevant inspiration for the interpretation and application of BITs.<sup>103</sup> In this context, there are two principal ways in which

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100. See Stephan W. Schill, *From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?*, BRIT. INST. INT'L & COMP. L., [http://www.biiicl.org/files/5630\\_stephan\\_schill.pdf](http://www.biiicl.org/files/5630_stephan_schill.pdf).

101. Some authors argue for a greater role for general principles of law. See, e.g., Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 25 VA. J. INT'L L. 57, 60 (2011). Tribunals have also recognized the potential role of general principles identified through a comparative analysis. Thus, one tribunal noted that “[t]he fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark.” *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, ¶ 166 (June 7, 2012).

102. See, e.g., Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 114 (M.D. Evans ed., 2010) (“[S]ince . . . it was the intention of the draftsmen of the [Permanent Court of International Justice] Statute that the ‘general principles of law’ should provide a fall-back source of law in the event that no treaty and no customary rule could be found to apply to a given situation, it is clear that to this extent there exists a hierarchy of sources. If a treaty rule or a customary rule exists, then there is no possibility of appealing to general principles of law to exclude or modify it.”).

103. Tarcisio Gazzini, *The Role of Customary International Law in the Field of Foreign Investment Law*, 8 J. WORLD INVESTMENT & TRADE 691, 691 (2007) (“[C]ustomary rules

customary international law interacts with investment treaties.

Firstly, there are many provisions in investment treaties that explicitly refer to rules of customary international law. Indeed, the inclusion of such provisions would appear to be increasing. For example, the Korea-U.S. Free Trade Agreement provides that: “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”<sup>104</sup> It continues as follows:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.<sup>105</sup>

It is not only in relation to the minimum standard of treatment that customary international law has been expressly relied upon. Annex 10-C of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) provides that its rule on expropriation in Article 10.7.1 “is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”<sup>106</sup> The CAFTA-DR also makes a reference to customary international law in Article 10.6(2) which requires restitution or compensation “in accordance with customary international law” where the property of an investor has been requisitioned or unnecessarily destroyed by the armed forces of a party during armed conflict or times of strife.<sup>107</sup> These examples demonstrate that states have customary international law in mind when they draft their investment treaties, and they often expressly refer to this source in specific treaty provisions.

Secondly, even in the absence of an express reference, customary international law may also be relevant to the interpretation and application of a treaty on the basis of Article 31(3)(c) of the Vienna Convention. The Convention requires a treaty interpreter to “take into

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constantly and intensely interact with bilateral and multilateral rules.”); José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 31 (2009) (“There are many other provisions in [investment] treaties that explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens.”).

104. Free Trade Agreement, U.S.-S. Kor., Mar. 15, 2012, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [hereinafter Korea-U.S. FTA].

105. *Id.* art. 11.6.

106. Dominican Republic-Central America-United States Free Trade Agreement, Annex 10-C, Aug. 5, 2004, [http://www.sice.oas.org/Trade/CAFTA/CAFTADR\\_e/CAFTADRin\\_e.asp](http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp) [hereinafter CAFTA-DR].

107. *Id.* art. 10.6(2).

account . . . relevant applicable rules of international law.”<sup>108</sup> Given that customary international law is by its very nature applicable to all states,<sup>109</sup> there is little doubt that these rules provide part of the wider context of an investment treaty for the purpose of the Vienna Convention.<sup>110</sup>

## VI. TOWARDS THE CODIFICATION OF CUSTOMARY INTERNATIONAL INVESTMENT LAW?

If it is accepted that customary international law can play a role in providing common standards that underpin investment treaties, the task of identifying customary international law for the protection of foreign investment is not straightforward. It is well known that customary international law requires evidence of general practice accepted as law.<sup>111</sup> On this basis, it is often said that custom is made up of two components—state practice and *opinio juris*. Yet, it is a mistake to consider these as two separate components, as they are intrinsically linked. *Opinio juris* can be considered as a way of explaining the emergence of particular state practice. To this end, the International Court of Justice (ICJ) has stressed that “not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of [customary] law requiring it.”<sup>112</sup> There is clear evidence that states still support this understanding of customary international law in the field of investment protection. For example, several investment treaties concluded by the United States with other states explicitly confirm that customary international law “results from a general and consistent practice of

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108. See Vienna Convention on the Law of Treaties, *supra* note 26, art. 31(3)(c).

109. Customary international law, however, is not applicable if the state is a persistent objector. See *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 117, 131 (Jan. 18).

110. See, for example, Jeswald W. Salacuse, *THE LAW OF INVESTMENT TREATIES* 150–52 (2010), although he also notes that “the application of the Vienna Convention’s Article 31(3)(c) to the interpretation of investment treaties requires a careful and balanced approach in order to avoid unjustifiably including the same rules of international customary law that the contracting states sought to avoid by making a treaty.” See also Martins Paparinskis, *Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* (Chester Brown & Kate Miles eds., 2011) (discussing *inter alia* when customary international law is “relevant” for the purpose of interpreting investment treaties).

111. Rules of Court, 1978 I.C.J. Acts & Docs. (ser. D) No. 4, art. 38(1). The question of the formation and evidence of customary international law was placed on the agenda of the ILC in 2012. See 2012 Report, *supra* note 59, ch. VIII.

112. *North Sea Continental Shelf Cases*, *supra* note 32, ¶ 77. Thus, in the *North Sea Continental Shelf Case*, the International Court of Justice dismissed a practice that could not be shown to be caused by a belief that there was a rule of customary international law.

States that they follow from a sense of legal obligation.”<sup>113</sup>

Evidence of state practice and *opinio juris* can be collected from a number of sources, including “administrative acts, legislation, decisions of courts and activities on the international stage.”<sup>114</sup> Similarly, the tribunal in *Glamis Gold* mentioned the following material sources of custom: “treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.”<sup>115</sup>

Nevertheless, proving the existence of customary international law is often a difficult task, particularly in the context of litigation that necessarily involves a limited number of states. Moreover, in the case of an alleged general rule of customary international law, the focus of the exercise is not on what the parties to the treaty think is custom. Rather, it is necessary to look more broadly for evidence of “extensive and virtually uniform” practice that is representative of the international community as a whole.<sup>116</sup> In the *Nicaragua Case*, the ICJ noted the following:

The Court notes that there is in fact evidence . . . of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom “as evidence of general practice accepted as law,” the Court may not disregard the essential role played by *general practice*.<sup>117</sup>

Yet, there has often been reluctance on the part of courts and tribunals to enter into an explicit analysis of state practice and *opinio juris* in their identification of customary international law.<sup>118</sup> Thus, one

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113. CAFTA-DR, *supra* note 106, Annex 10-B; *see also* Letters between the Trade Ministers for the United States and Singapore, OFFICE OF U.S. TRADE REPRESENTATIVE, [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file665\\_4057.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file665_4057.pdf).

114. Malcolm N. Shaw, *INTERNATIONAL LAW* 82 (6th ed., 2008).

115. *Glamis Gold, Ltd. v. United States*, Award, ¶ 603 (UNCITRAL Arb. June 8, 2009).

116. *North Sea Continental Shelf Cases*, *supra* note 32, ¶ 73.

117. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶ 184 (June 27) (emphasis added). Note, however, that the Court has also been willing to recognize regional or bilateral custom. *See, e.g.*, *Case Concerning Right of Passage over Indian Territory* (Port. v. India), Merits, 1960 I.C.J. 6, 37 (Apr. 12); *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 133, ¶ 141 (July 13).

118. For a recent analysis, *see generally* Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice's*

commentator noted that the ICJ has often made decisions about the existence of customary international law “without embarking upon any empirical research as to whether the respective rules were recognized as law and reflected in State practice.”<sup>119</sup> Similarly, a general assessment of state practice and *opinio juris* is often missing from decisions of investment tribunals. Surveying decisions rendered by International Centre for Settlement of Investment Disputes tribunals between January 1, 1998, and December 31, 2006, O.K. Fauchald concludes that “no tribunal made its own assessment of whether a rule of customary international law existed, and only exceptionally did tribunals explicitly address questions concerning *opinio juris*.”<sup>120</sup>

One cannot necessarily place all of the blame on tribunals for this lacuna. Proving the existence of custom is essentially a question of fact,<sup>121</sup> and the burden of proof lies upon the party claiming the existence of a customary rule.<sup>122</sup> The decisions of courts and tribunals are therefore largely a response to the evidence that parties have placed before them. Yet, is it truly reasonable to expect litigants to comprehensively collect and present evidence of state practice and *opinio juris*?

The challenge of determining the existence of customary international law is made even more difficult by that fact that custom is by its very nature evolutionary, so that it changes in accordance with trends of state practice and *opinio juris*. Indeed, the tribunal in *Glamis Gold* noted that “although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement . . . because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision . . . .”<sup>123</sup> What this statement of the tribunal reveals is that courts and tribunals do not consider that their role is to establish the

*Jurisprudence: 2000–2009*, 60 INT’L & COMP. L.Q. 681 (2011) (emphasizing how the Court has recourse to several different techniques in the identification of custom).

119. Rüdiger Wolfrum, *The Legal Order for the Seas and Oceans*, ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 175 (M. Nordquist & J. Moore eds., 1995) (citing *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13 (June 3)).

120. See Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT’L L. 301, 311 (2008) (“[F]ew ICSID tribunals made any extensive assessment of generalized state practice.”). He concludes that “ICSID tribunals in general have a significant potential to improve their reasoning relative to customary international law and general principles of law.” *Id.* at 313.

121. *Glamis Gold, Ltd. v. United States*, Award, ¶ 607 (UNCITRAL Arb. June 8, 2009) (“Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions.”).

122. *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20). This is in accordance with general principles relating to the production of factual evidence.

123. *Glamis Gold*, *supra* note 121, ¶ 604.

definitive state of customary international law at the time of the claim, but rather to determine whether the litigants have presented convincing evidence for the claims they are making. This leaves basic questions about the state of customary international law unanswered.

It is precisely in this area of weakness for arbitral tribunals that other bodies may step in to contribute to the development of international investment law. As noted above, the codification of customary international law is one of the core tasks of the ILC.<sup>124</sup> Unlike tribunals that must rely upon evidence produced by the parties in litigation, the procedures followed by the ILC mean that it has the time and ability to gather a broad range of evidence of state practice and *opinio juris* before reaching conclusions on the status of customary international law. Moreover, states' interactions with the ILC, as described above, help it in this task. Indeed, the advantage of the Commission taking on the task of codification, as opposed to private bodies or other intergovernmental institutions, is its central place within the UN system and its relationship with states. This interaction allows the ILC to request information directly from all states, and it also permits states to comment on the proposals of the ILC as they are made.

Even for a body such as the ILC, the task of codifying customary international investment law is not necessarily straightforward. There are certain features of this area of law that pose specific challenges for the process of codification. In particular, the proliferation of investment treaties raises problems. In this regard, C. McLachlan comments that "the overwhelming majority of State practice in this field in the last few decades has been through the medium of treaty-making, starving custom of independent progressive development."<sup>125</sup> Thus, he concludes that "an application of the classic test for the formation of a rule of custom in this area would have little meaning, given the paucity of any State practice outside the treaties' reach."<sup>126</sup> While it is true that there are many investment treaties, does it necessarily follow that there is a lack of state practice and *opinio juris*? Several comments can be made in this regard.

In the first place, some authors would argue that the thousands of BITs have themselves contributed to the development of customary international law, muddying the waters between treaty and custom.<sup>127</sup>

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124. ILC Statute, *supra* note 8, art. 1, para. 1.

125. McLachlan, *supra* note 50, at 365.

126. *Id.* at 394.

127. Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128 (2003); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 29–30 (2004);



This argument appears to have received a positive reception in *Mondev v. United States*, where the tribunal noted that “such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”<sup>128</sup> Of course, it begs the question whether this practice is accompanied by the requisite *opinio juris*.<sup>129</sup> Regardless of the answer to this question, there is clearly a serious issue that needs addressing and the ILC could play a valuable role in this process. One of the key challenges for codification in this area is to disentangle treaty law from customary international law in order to know when one can talk about universal rules and principles and when one should concentrate on identifying the intentions of the particular parties to a treaty.

Secondly, as noted above, several treaties expressly refer to customary international law and therefore practice in relation to those provisions will necessarily relate to the formulation of customary rules.<sup>130</sup> For example, states have expressly considered the content of customary international law in their pleadings in relation to the interpretation of Article 1105 of the North American Free Trade Agreement and tribunals have sometimes considered this evidence.<sup>131</sup> Of course, pleadings will only represent the views of the states involved in litigation, and it would also be necessary to look for other evidence of state practice and *opinio juris* in order to prove the existence of a general rule of customary international law. Nevertheless, it demonstrates that there are still opportunities for states to express views on the content of customary international law, distinct from treaty rules.

Thirdly, despite the proliferation of investment treaties, there are still many inter-state relationships that treaties do not govern.<sup>132</sup> Indeed, the importance of a codification exercise is that it gathers and evaluates all potential evidence of state practice and *opinio juris* before it comes to

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Alvarez, *supra* note 103, at 18, 59; IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 53 (2008). See also the more skeptical views of Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675, 685 (2010).

128. *Mondev Int’l v. United States*, ICSID Case No. ARB (AF)/99/2, Award, ¶ 125 (Oct. 11, 2002).

129. See Jean d’Aspremont, *International Customary Law: The Story of a Paradox*, in *SOURCES OF TRANSNATIONAL INVESTMENT LAW* 22 (Eric de Brabandere & Tarcisio Gazzini eds., 2012). Cf. *Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. 103, ¶ 90 (May 24).

130. See *infra* text accompanying notes 104–107.

131. See, e.g., *Glamis Gold, Ltd. v. United States*, Award, ¶ 603 (UNCITRAL Arb. June 8, 2009).

132. Gazzini estimated in 2007 that “BITs cover only about 13% of the bilateral relationships between the States composing the international community.” Gazzini, *supra* note 103, at 691.

conclusions about the existence of certain rules of customary international law.

It follows, and this Article argues, that the existence of more than 2,500 BITs would not necessarily prevent the ILC from gathering sufficient evidence of state practice and *opinio juris* to codify customary international law. Furthermore, it should not be forgotten that it is also possible that the process of formulating and discussing rules on investment protection could lead to the crystallization of customary rules that did not previously exist, provided that they find support of sufficient states.<sup>133</sup>

Regardless of the availability of sources, there are critics who believe that trying to identify substantive rules of customary international law in the field of investment protection is a fool's errand. For example, J. D'Aspremont argues that many of the standards that are commonly claimed to have crystallized into customary international law are "highly imprecise and vague,"<sup>134</sup> and he highlights the international minimum standard of treatment as a prime example.<sup>135</sup> If true, this critique arguably holds true of many rules found in investment treaties as well. Moreover, it ignores the view that states clearly accept that such rules do exist as a matter of customary international law. Yet, what this critique does usefully highlight is that this Article's approach need not seek specific rules of conduct that guide states in particular situations, but rather general principles which provide an international benchmark for state behavior in relation to foreign investors.<sup>136</sup>

#### VII. PLACING CUSTOMARY INTERNATIONAL INVESTMENT LAW ON THE AGENDA OF THE ILC

There are several aspects of international investment law for which clarification and elucidation of customary international law could be helpful, including rules and principles relating to expropriation, fair and equitable treatment, denial of justice, and constant protection and security. In many instances, these are standards that investment treaty tribunals are already trying to interpret according to a multilateral logic—an exercise that would itself benefit from a firmer basis in actual evidence of state practice and *opinio juris*.

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133. For further consideration of crystallization, see JAMES HARRISON, MAKING THE LAW OF THE SEA 17–19 (Cambridge Univ. Press 2011).

134. D'Aspremont, *supra* note 129, at 33.

135. *Id.*

136. Indeed, it is noteworthy that several recent instruments talk of general principles of customary international law. See, e.g., Korea-U.S. FTA, *supra* note 104, Annex 11-A ("[T]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.").

All of these issues also arguably meet the ILC's own criteria for the selection of topics, notably that:

[T]he topic should reflect the needs of the States in respect of the progressive development and codification of customary international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification.<sup>137</sup>

In particular, given the fact that tribunals are increasingly faced with having to identify and apply rules of customary international law in relation to the protection of foreign investors, there would appear to be an urgent need for action on this point. Moreover, despite many statements about the evolution of customary international law, particularly in relation to the minimum standard of treatment,<sup>138</sup> there has been little substantive and comprehensive analysis of state practice and *opinio juris* in this area.

It would appear that the ILC has already recognized the significance of at least one of these issues. In 2011, the ILC inscribed the subject of "fair and equitable treatment" onto its long-term work plan.<sup>139</sup> The vast majority of BITs make reference to fair and equitable treatment, and it is perhaps "the most frequently pleaded obligation in international investment arbitration."<sup>140</sup> There is, of course, intense controversy about the precise meaning of this term. The concept paper prepared for the ILC identifies a number of questions relating to the standard, including: (1) whether fair and equitable treatment is synonymous with the international minimum standard, (2) whether the fair and equitable treatment standard now represents customary international law, and (3) whether fair and equitable treatment is a principle of international law.<sup>141</sup>

It is apparent that the concept paper raises a wide range of questions concerning fair and equitable treatment, including both treaty law and customary law aspects of the problem. It is suggested that, in light of the foregoing arguments, the questions relating to customary international law would be particularly suitable for study by the ILC. It is in this respect that the Commission can draw on its strengths and it

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137. See Rep. of the Int'l Law Comm'n, 50th Sess., Apr. 20–June 12, July 27–Aug. 14, 1998, U.N. Doc. A/53/10, ¶ 553; GAOR, 53d Sess., Supp. No. 10 (1998).

138. *Mondev Int'l v. United States*, ICSID Case No. ARB (AF)/99/2, Award, ¶ 116 (Oct. 11, 2002).

139. See 2011 Report, *supra* note 57, ¶ 365.

140. Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in INVESTMENT TREATY LAW CURRENT ISSUES III 209 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., BIICL 2009).

141. 2011 Report, *supra* note 57, Annex D.

can make the greatest contribution to promoting coherence in the development of international investment law by giving a more precise formulation and legal basis for the application of the minimum standards of treatment under customary international law.

It could of course be objected that the ILC has tried to undertake this task before, but it was defeated by political deadlock. Yet, it is questionable whether such controversy continues to exist today. If anything, the conclusion of more than 2,500 investment treaties by states across the world suggests that the sensitivity towards the treatment of aliens under international law has diminished.<sup>142</sup> Such treaties are not only concluded between developed countries and developing countries, but also between developing countries, demonstrating the general acceptability of investment rules in the twenty-first century. The ILC could make a substantial contribution to this question by identifying relevant state practice and *opinio juris*. Not only can it assist tribunals in identifying relevant material evidence of customary international law, but the ILC can also suggest, in accordance with the understanding of codification discussed above,<sup>143</sup> how to fill gaps in a manner that may contribute to the development of law in this area.

#### VIII. CONCLUSION

International investment law is already on the agenda of the ILC and it looks likely to stay there as the topic continues to enjoy a central position in the development of international law. This raises questions about precisely which aspects of the subject the ILC should consider. This Article argues that there is a considerable difference between those standards of investment law that are based solely on treaty law and those standards that owe some of their existence to broader rules and principles of customary international law or general principles. To date, the ILC has concentrated its efforts on demystifying the MFN clause, which belongs in the former category. Yet, the diversity of language of MFN clauses and the fact that such provisions rest solely upon a treaty basis means that it is difficult to draw generalizable conclusions in this area. Moreover, there is already a growing body of scholarly analysis and policy advice so that any future recommendations of the ILC are in

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142. In 1998, an independent Study Group on the Future Work of the International Law Commission concluded that “[a]lthough the customary status of some of the rules [relating to the taking of property by states] remains controversial, the prospects for reaching agreement look more promising now than at any time in the past.” *THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW* 40 (M. R. Anderson, A. E. Boyle, A. Vaughan Lowe & C. Wickremasinghe eds., 1998). It therefore recommended the issue as a topic for exploration. *Id.*

143. See discussion *infra* Part II.

danger of being lost in the crowd. Similar observations could be made about other controversial treaty standards in investment jurisprudence, such as umbrella clauses or procedural conditions attached to dispute settlement.

In contrast, the controversies and uncertainties surrounding the current status of customary rules for the protection of foreign investment would seem to be an area in which the ILC, embedded as it is within the intergovernmental structures of the UN, would be in a prime, if not unique, position to address. The continuing importance of customary international law to the protection of foreign investment, particularly when it is expressly incorporated into treaties, means that this is an area where the ILC could make a real difference by drawing upon its expertise in codification. If successful, the results of the codification process are likely to be highly persuasive, and they will give more legitimacy to centralizing trends evident in the decisions of investment tribunals. Thus, where there are standards of investment protection found in customary international law, the elaboration of draft articles by the ILC, in close consultation with the international community of states, could help to provide a firm foundation for the coherent development of these aspects of international investment law. It follows that the enterprise of codifying rules of customary international law would appear to offer the ILC a valuable opportunity to achieve its stated aim of “safeguard[ing] against fragmentation of international law and stress[ing] the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment.”<sup>144</sup>

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144. See 2012 Report, *supra* note 59, ¶ 246.